

Database Protection : Divergence or legal Competition across the Atlantic?

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The European Directive

- is different but not opposed to the US views
- is not exempt of criticisms

but

- is not a threat for Science and public Commons
- it seems to be a good pragmatic incentive for an open and secure access to information on-line

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The two aspects of the 1996 European Directive

- Copyright protection only for « intellectual creation » in the database structure
≠ « sweat of the brow » criteria,
in accordance with US *Feist* case
- Non-copyright protection (*sui generis*) against misappropriation of substantial part of a database if substantial investment can be proved
protection of non-copyrighted data
already exist in US laws :
ie. protection of *trade secrets*
with « *independent economic value* »

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A *sui generis* protection under some criticisms

- uncertainty of the qualification of « substantial »
 - substantial investment
 - substantial part of the content
 - substantial changes to the content
- uncertainty of the term of protection
(15 years or indefinite ?)
- difficult interaction with copyright rules
(fair use exemptions, ...)

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Not a tragedy for « public commons »

- *Sui generis* Rights don't covers
 - all non-copyrighted datas
(but only the content of some databases)
 - each data separately
(but only against extraction or re-use of some
substantial aggregation of datas)
- In Europe, no cases where *sui generis* protection
was used against scientific research or access to
public information (only cases about : phone
directories, Web-search tools, television guides, ...)
- and, if necessary, there will be ways to protect
open science and public datas (constitutional rights,
competition rules, ...)

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The real benefit of the *sui generis* protection

- In information society, we must balanced :
 - public access to open information
 - private demands for protection against piracybut on-line digital technologies give
 - easy access to information
 - + easy way to copy and misappropriate
 - The real threat is the use of technical tools to protect each data (encryption, pay-per use, ...) and to forbid open access
- ⇒ The *sui generis* protection combines large on-line distribution with legal security

For citizens and for democracy,
legal fences are better than technical fences

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In conclusion

- Our European Database Directive is not perfect but it is a pragmatic contribution to the emerging global « Digital Law »
- Legal competition between US and UE (first to invent/first to file, software patents, business methods, database protection, ..) is not a bad way to prepare a next step of harmonization (in WIPO ? or at the Millennium Round ?)

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